In the High Court of Judicature at Madras

Dated: 15.06.2006

Coram

The Honourable Mr.JUSTICE R.BALASUBRAMANIAN
and
The Honourable Mr.JUSTICE M.JEYAPAUL

Criminal Appeal No.1498 of 2003

Acit Boran Sam .... Appellant/Accused

Vs.

State by Inspector of Police,
Avadi Tank Factory Police Station,
Chengai East Dt. .... Respondent/Complainant

APPEAL under Section 374 of Criminal Procedure Code against the judgment dated 29.8.2003 made in S.C.No.253 of 1996 on the file of learned Principal Sessions Judge, Chengalpattu.

For Appellant : Mr.S.Shanmugavelayutham
For Respondent : Mr.N.R.Elango, Addl. Public Prosecutor

J U D G M E N T

(Judgment of the Court was delivered by R.BALASUBRAMANIAN,J)

The appellant stands convicted under Section 449 and 302 IPC in S.C.No.253 of 1996 on the file of the Court of Sessions and stand sentenced to undergo five years rigorous imprisonment together with fine of Rs.1,000/- for the former offence and imprisonment for life with fine of Rs.1,000/- for the latter offence. Default sentence is also provided for. Hence the appeal.

2. Heard Mr.S.Shanmugavelayutham, learned counsel appearing for the appellants and Mr.N.R.Elango, learned Additional Public Prosecutor for the State.

3. The prosecution case is that by trespassing into the house of Abheysingh – since deceased, the accused shot him with his rifle and thereby caused his death. The occurrence according to the prosecution is shown to have taken place at 4.00 a.m. on 5.2.1995 i.e., in the early hours immediately after the mid night of 4.2.1995.

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P.Ws. 1 and 5 are the sons of the deceased, while P.W.4 is the wife of the deceased. Admittedly, in this case P.W.1 alone had been examined as an eye witness to the occurrence and it is he who lodged Ex.P.1 with P.W.38, the Sub-Inspector of Police. Therefore, we summarise the evidence of P.W.1 here under:

"He was studying in +2 during the relevant time; on 4.2.1995, he told his father to wake him up at 4.00 a.m. in the next day morning and then went to bed; in the early hours of the next day morning, calling bell went on ringing, which made everybody in the house to wake up; P.Ws.1 and 5 were living in the house along with the deceased and his wife P.W.4; his father went out to open the door, but however he could not open the door, as it was noticed later that it was bolted from outside; P.W.4 advised them not to go out, but however the deceased insisted in going out with a stick in his hand; P.W.1 followed him and they were going by the small aisle just by the side of the house; as they were going, his father shouted as to who is outside; as they went to the front side of the house, he saw the accused standing with a gun in his hand and the accused fired once at his father; on receiving the gun shot injury near the right collar bone, his father fell down and shouted; the witness seeing the accused shouted that he had seen him and he started chasing him; before proceeding further, he opened the front door from outside and as accused was running, he chased him; as he could not reach the accused, he came back to attend to his father and in that process, he shouted for help from the neighbours; P.W.16 is his neighbour and as he tried to reach his house, he found that his house door was also bolted from outside; the upstairs portion of the house, where he and his father were living were occupied by P.Ws6 and 18; he found the doors for those respective portions were also bolted from outside and he opened it; in the meantime, P.W.s 4 and 5 also came out of the house and were making calls over phone for help; ambulance came in which his father was taken to the hospital by him, P.Ws.4,5 and 6; P.W.7 another doctor also joined them en route; on finding that the condition of the injured was precarious, they entered the Stedford Hospital, Ambattur for treatment, where P.W.3 was working; P.W.3 gave him immediate treatment and then advised that the injured to be taken to the Government Kilpauk Medical College Hospital; en route, Abhey Singh told them that the accused alone had committed the crime; they reached the Government Kilpauk Medical College Hospital, where P.W.2 was on duty and P.W.2 on examination, pronounced his

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father dead; police came to the hospital to whom he gave Ex.P.1 the complaint; since there were electric lamps in his house as well as street lights were burning, he could see the accused; M.O.1 is the weapon used by the accused in committing the crime."

4. P.W.2 is the doctor in Government Kilpauk College Hospital at 5.05 a.m. on 5.2.1995, Abhey Singh - since deceased was brought before him by P.W.7 accompanied by P.W.s 1,4 and 5. She found the injured already dead and Ex.P.2 is the death report. Ex.P.3 is the intimation sent by her to the police. P.W.38 is the Sub-Inspector of Police in the investigation police station. On receipt of the intimation from the hospital at 6.25 a.m., on 5.2.1995, he reached the Government Kilpauk Medical College Hospital and by examining P.W.1 recorded the statement at 7.30 a.m. He also examined P.W.4 by recording the statement. As they were narrating in Hindi, with the help of the Inspector of Police, he got it translated. Ex.P.1 is the said complaint. He registered the complaint in his police station Crime No.51 of 1995 under Section 302 IPC. Ex.P.37 is the printed first information report prepared by him. As regular Inspector of Police was on other duty, he handed over the material records to the in-charge Inspector. Ex.P.38 is the rough sketch prepared by him in the presence of witnesses. P.W.39 had been examined to prove the steps taken by P.W.38 in registering the complaint and preparation of the observation mahazar. He had also given evidence about the investigation done by the Inspector of Police by name, Chandrasekar. Inspector of Police, Chandrasekar on receipt of the material records examined witnesses and recorded their statements. Chandrasekar conducted inquest over the dead body between 3.00 p.m. and 5.00 p.m. on 5.2.1995 and prepared Ex.P.40 inquest report. Chandrasekar also recovered blood stained earth, sample earth, wooden log with hole, tin sheet with hole under a mahazar attested by witnesses. He sent the case properties to the Court with a requisition Ex.P.22 for subjecting the same to chemical examination. P.W.30 is the Magisterial Clerk, who speaks about the receipt of the case properties along with Ex.P.22 requisition given by Chandrasekar, Inspector of Police. P.W.33 is the police constable, who carried the case properties and delivered it to the Court. As an enclosure to Court's letter Ex.P.23, the case properties were sent to the laboratory. Again three more case properties were received by the Court along with Ex.P.24 requisition given by the Inspector of Police Chandrasekar. As an enclosure to Court's letter Ex.P.25, those properties were also sent to the laboratory. Ex.P.26 is the chemical examination report. Ex.P.27 is the serologist report. Exs.P.28 and P.29 are the chemical examiner's and serologist's report for the properties sent along with Court's letter Ex.P.25. Chandrasekar, Inspector of Police had sent a requisition to the hospital to conduct post mortem on the dead body of Abhey singh. P.W.34 is the police constable, who carried the requisition for post mortem to the

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hospital, where he identified the dead body and he was present through out the post mortem. After post mortem, he removed M.O.4 Kurdha from the dead body and hand over the same to the Inspector of Police, which was recovered under Form 95. P.W.35 conducted post mortem on the dead body at 11.00 a.m. on 6.2.1995 on receipt of requisition for post mortem. During post-mortem, he found various symptoms, as noted by him in Ex.P.35 the post-mortem report. The symptoms noted therein are as here under:

> "1) A circular, contused laceration of 1cm x 1cm, just below the middle third of right collar bone, found entering the thoracic cavity, through the second intercostal space.
>
> 2) A contused laceration of 1cm x 1cm over the upper aspect of right upper lobe of the lung in front, with a contused laceration of 3cms x 2 1/2 cms over the interlobar surfaces of the upper and middle lobes of the lung.
>
> 3) A vertical, contused laceration of 4 1/2 cms x 3cms over the back of chest near the midline on the right side, with comminuted fracture of 5th and 6th ribs on the right side near the vertebral column, with diffuse bruising over the chest wall.
>
> The right thoracic cavity contained 250 cc of blood.
>
> OTHER FINDINGS:
>
> BRAIN : Surface vessels empty
> HEART : All chambers contained minimal amount of blood.
> LUNGS : Both pale
> HYOID BONE: Intact.
> STOMACH : Contained 100 cc of whitish fluid. Mucosa:Pale No specific smell could be made out.
>
> All the other internal organs were found pale."

The doctor is of the opinion that death is due to haemorrhagic shock, as a result of gun shot injuries. According to him a rifle like M.O.1 would have caused the injuries noted in the post-mortem report. Ex.P.36 is the blood group certificate.

5. Chandrasekar, Inspector of Police, continued the investigation by examining further witnesses. The accused was produced in the police station on 8.2.1995 at about 1.00 p.m. by a

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team of people from Patna. Accordingly, Chandrasekar, Inspector of Police arrested him. At that time, the accused was examined by him in the presence of P.Ws.31 and 32 and the accused gave a voluntary confession statement, the admissible portion of which is Ex.P.32. Pursuant to Ex.P.32, Mos.1 to 9 series were recovered under mahazar attested by witnesses. Further witnesses were examined by Inspector of Police Chandrasekar. Inspector of Police Chandrasekar examined witnesses at Patna by recording their statements. As Inspector of Police Chandrasekar went on medical leave P.W.39 continued the investigation thereafter. P.W.39, verified the investigation already done. P.W.39 continued the investigation, as already stated, from where it was left by Inspector of Police Chandrasekar. He also examined further witnesses by recording their statements. He recovered Ex.P.41 the railway warrant issued to the detenu on 2.2.1995. Ex.P.42 contains the name of the accused in serial number 2. Exs.P.43 and 44 are the xerox copies of the warning memo issued to the accused. Ex.P.45 is another proceeding on the file of employer of the accused against him. Ex.P.46 is the amendment order issued by the employer of the accused. Ex.P.47 is the office order relating to the accused. Ex.P.48 is another office order of the employer of the accused against him. Ex.P.49 is the attested copy of the Mid term Test Scheme Examination for senior cadre post and Ex.P.50 is the attested xerox copy of the movement order.

6. P.W.2 is the doctor in Government Kilpauk Medical College Hospital, who on examining Abhey Singh pronounced him dead and gave Ex.P.2 death report and sent Ex.P.3 death intimation to the police. P.W.3 is the doctor in the Stedford Hospital at Ambattur, who gave initial treatment to the victim. P.W.4 is the wife of the deceased. She also deposed that on hearing the calling bell noise in the early hours of 5.2.1995, her husband went outside the house along with P.W.1 and as they went out, she heard a gun shot sound. On hearing that, she and P.W.5- her son came out. She would correct herself by stating that on hearing the gun shot sound, they moved from one room to another room and when they peeped through the window, they saw the accused running away from the scene and then only they came out. Her husband told her that he had received gun shot wound and that it is the accused, who had shot him. Her evidence as to what steps were taken thereafter in taking her husband to the hospital is on the same lines as spoken to by P.W.1. P.W.5 is the other son of the deceased and P.W.4. He would also state that he heard the gun shot sound from outside the house and heard P.W.1 shouting that the accused had shot his father. He would then state that as he and his mother P.W.4 were peeping through the window, they saw the accused with the rifle running chased by P.W.1. When they came out, his father told them that the accused had shot at him. His evidence as to what happened thereafter is on the same lines as spoken to by P.Ws.1 and 4. P.W.6 during the relevant time was working as Assistant Commandant in C.R.P.F. at Avadi and he was staying in the upstairs of the building

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where the deceased was staying. P.W.18 was also occupying another portion in the upstairs of the same house. However, P.W.6 was treated as hostile, since he did not speak that he saw the accused running from the scene of occurrence with the rifle. But however, before he was treated as hostile, he would state in his evidence that P.W.1 told him that his father was shot by a Bengali boy and the said assailant is the accused. He would then give evidence on the same lines as spoken to by P.Ws.1,4 and 5 as to the transport of the injured from one place to another and ultimately they reached the Government Kilpauk Medical College Hospital. P.W.7 was the Chief Medical Officer in-charge of the CRPF Station Hospital at Avadi. He was also treated as hostile, since he did not speak, that P.W.5 told him that his father was shot by the accused. P.W.8 is the wife of the accused himself and she also turned hostile, since she did not speak in Court that the accused, without authority from his employer, visited the house on 4.2.1995. P.W.9 is the witness to the preparation of Ex.P.4 observation mahazar and recovery of Mos.2 and 3 under Ex.P.5 and M.Os.9 and 10 under Ex.P.6. P.W.10 was the Assistant Commandant of CRPF at Avadi during the relevant time. He was also treated as hostile, since he did not support the prosecution case, that he told during investigation that he was informed that the accused has committed the crime. But however, he would speak in his evidence before he came to be treated as hostile that on instructions from his superior P.W.7, he went to the Central Railway Station with P.W.15 to watch the movement of CRPF personnel and at that time, he did not know, who the assailant is. His evidence, till he was treated as hostile, also shows that on reaching the Railway Station, he found the accused boarding a train bound for Avadi with his service rifle hanging on his shoulder and he was also in his CRPF uniform. When he asked him as to where he was going, the accused had replied that he is coming from Patna and going to Avadi. P.W.11 is the wife of a CRPF constable. She knows the accused. She was treated as hostile, since she did not support the prosecution case that she saw the accused at 9.00 p.m. on 4.2.1995 in the CRPF campus at Avadi. P.W.12 is the witness to the preparation of Ex.P.4 observation mahazar and recovery of Mos.1 to 8 under Ex.P.5 and Mos.9 and 10 under Ex.P.6. He also witnessed the arrest of the accused on 8.2.1995. He would then depose that he took charge of the accused on 8.2.1995 when he was brought from Nandal in Maharashtra from the Railway Station at Chennai and then surrendered him in the investigation police station. M.O.9 series were recovered from him at the Railway Station. P.W.13 was attending to the telephone calls from 6.00 a.m. to 8.00 a.m. on 5.2.1995. At about 7.00 or 7.05 a.m. on that date, P.W.10 called over telephone from the Railway Station at Chennai stating that the accused is boarding a train bound for Avadi from Chennai and that the accused was boarding the train, when it was on its move. He was asked to pass on the message to the Principal and accordingly, he did it. P.W.14 is the Principal of the Recruitment Training Centre No.2 at CRPF, Avadi. The deceased was

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employed in that company. In the year 1994, the deceased sent the communication to him complaining about the conduct of the accused and on that, he enquired the accused as well as the deceased. Then he advised the accused to respect the seniors in the office. Despite that the accused was continuously misbehaving and therefore, a warning memo was given to the accused. Ex.P.7 is the warning memo given by the deceased to the accused and the same was acknowledged by the accused. Again on 12.1.1994, the deceased had sent a detailed report Ex.P.8 to this witness. Ex.P.9 is the warning memo issued by the deceased on 13.1.1994 to the accused and it contains his acknowledgement. P.W.15 examined in this case was treated as hostile, since he did not support the prosecution case that he was informed to go and apprehend the accused by his superiors as the person responsible for the crime. But however, he would admit that P.W.10 was working as Assistant Commandant in the head office of CRPF, where the deceased was also employed and the accused was employed under the deceased. He and P.W.10 went to the Central Railway Station at about 6.30 a.m. on the occurrence day. In the suburban Railway platform, they noticed the accused, who was in his uniform having a rifle on his shoulder. As the train was moving out, the accused boarded in it. P.W.16 during the relevant time was working in the CRPF campus at Avadi as Assistant Commandant. He resides just opposite to the quarters, where the deceased was residing. P.W.17 is his wife. He knows the family of the deceased. At 4.00 a.m. on 5.2.1995, when he was sleeping in his house, he heard a sound hitting the tin sheet and also heard the foot steps of somebody running on the road. He also heard a lady shouting for help. He tried to come out of the house, but the entrance door was bolted from outside. He heard P.Ws.1 and 4 shouting for help and when they opened the door, he came out and at that time, P.W.1 told him that his father was shot at by the accused. However, he was also treated as hostile, since he did not support the prosecution case that on coming out he saw the accused running away with the rifle. P.W.17 is the wife of P.W.16, She was also treated as hostile, since she did not support the prosecution case that on coming out she saw the accused running away with the rifle. But however in her evidence that was recorded before she was treated as hostile, she had admitted that P.W.1 and P.W.4 opened their house door and when she came out, she noticed Abhey Singh lying on the ground in a pool of blood. P.W.18 was residing in a portion of the upstairs of the house, where the deceased was living. He would state that he did not know the accused and he had not seen him earlier. However, he would add that about 4.00 a.m. on 5.2.1995, he heard some noise resembling that of a thunder, which made him to wake up. As he peeped through the window, he saw a person in a military uniform running having in his hand something like rifle. As there was no light, he could not see it correctly. As he came down, P.Ws.1,4 and 5 told him that the accused ran away after shotting the victim in this case. P.W.s1,4 and 5 had said that the accused had fired at the victim and ran away.

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7. P.W.19 is in-charge of the stores of CRPF. He was in particular charge of weapon division. On 17.1.1995, he had issued weapon to the accused. Ex.P.10 is the "In and out Register", which contains the details of the weapons handed over to CRPF personnel. He would state that before issuing the weapons, he would verify whether the weapon is in working condition and then only issue. On 23.1.1995, when the accused in the company of other personnel was deputed to Patna on election duty, he issued a weapon to the accused and the other company people. He issued a rifle to the accused with Butt No.646; Body No.F 6044 and the rifle is double barrelled with 7.62mm calibre. M.O.1 is the rifle. He also issued 100 rounds of cartridges. At page 11 of Ex.P.10, the accused had acknowledged the receipt of the weapon and cartridges. Ex.P.11 is the said acknowledgement. The accused had not returned the weapon till he gave evidence. P.W.20 during the relevant time was working in CRPF campus at Avadi. He had also spoken about the grudge which the accused had against the deceased in this case. His evidence shows that the accused was caught red handed by the deceased, when he was copying in the examination and he was disqualified. Ex.P.12 is the answer paper of the accused and Ex.P.13 is the material used by the accused for copying. The deceased had made an entry on the top of Ex.P.12 itself that the accused was found copying. As already stated, the accused was disqualified from the examination. Ex.P.14 is the result sheet for that examination and again in serial number 90, it is noted that the accused was disqualified. The accused was permitted to take part in the subsequent examination. Ex.P.15 is the result for the subsequent examination. In that examination also, the accused failed. As there was some mistake in the results published, an amendment was issued in Ex.P.16, as a result of that the accused had to undergo the entire period of training all over again. P.W.21 during the relevant time was working as Inspector of Recruitment Training Centre No.3 at Maharashtra. On 6.2.1995, a flash message was received from the Recruitment Training Centre at Avadi that the accused is shown to have been involved in the murder of the victim in this case and therefore, he was required to return back to Recruitment Training Centre No.2, Avadi. P.W.21 was detailed to perform the duty. On the accused reaching Maharashtra, he was checked by the board members and his rifle was also checked by the armourer. The accused was also medically examined by the medical officer. After completion of all the formalities, he took the accused for the onward journey to Avadi. During the course of check, it was found that the accused was found in possession of 100 rounds of 7.62mm cartridges, but out of that one round was of a different lot and whenever ammunitions are issued, it would be issued from one particular lot and it is not possible to issue one round from a different lot. M.O.1 is the rifle. M.O.9 series are the rounds recovered from the accused, which contain a distinct single mark. M.O.10 do not belong to CRPF stores and that type of ammunitions are

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not supplied by them. P.W.22 is the police constable in CRPF at Avadi. He and the accused are having their residence in the same blocks and as such he knows the accused. At 7.45 a.m. on 4.2.1995, when he left his house for duty, he saw the accused going with his child in a cycle. P.W.23 during the relevant time was working as Vice Principal in C.T.C.-II at Avadi. He would state that the deceased caught the accused red handed while he was copying in the examination. Exs.P.12 to P.15 are the various proceedings issued by the deceased against the accused, which he handed over to the police. P.W.24 is also working as a writer in CRPF and he knows the accused and the deceased. On 8.1.1994, the accused did not report for duty and therefore, the deceased issued a warning memo to him, which the accused received. As the accused was continuing to be indifferent in his duty, the deceased issued another warning memo to him, which was also served on the accused. Ex.P.7 is the charge memo in which the accused had acknowledged. P.W.25 was working as Havildar in CRPF, Avadi during the relevant time. He had given evidence on the same lines as spoken to by P.W.24. P.W.26 was on election duty at Patna from 7.1.1995. He is in charge of deputing CRPF personnel received from Headquarters for election duty. On 26.1.1995, two companies of CRPF reported to him for election duty. One company was from Chennai and in that company the accused was there. The accused was deputed to do duty at Gaya. On 1.2.1995, the accused reported at Patna from there. On 2.2.1995, he was directed to report at Nandal, as his Service Training is to commence on 6.2.1995. He was asked to move with a Railway warrant. Ex.P.18 is the movement order dated 2.2.1995 given by him to the accused.

8. P.W.27 was working in the Central Training College, CRPF at Nandal, Maharashtra as Assistant Commandant. On 5.2.1995, a wireless message from Principal R.T.C.No.II, Avadi and addressed to the Principal of Central Training College, CRPF was received by him, which disclosed that the accused had fired Abhey Singh - since deceased and it contained a request that as and when the suspected person is received there, he must be arrested with his ammunitions and personnel belongings. Ex.P.19 is the said message and on that date, the accused did not reach Nandal. Steps were taken to watch the arrival of the accused. On 6.2.1995, the accused reached the Railway Station at about 5.45 p.m. and that is endorsed in Ex.P.18. On his arrival, he examined him and the board members also examined his personnel belongings. Ex.P.17 is the list prepared by the Board. His personal arms was inspected by P.W.28 - Head Constable and he noticed that the rifle barrel had oil deposit and in the bolt head also there was oil deposit. Ex.P.20 is the certificate given by P.W.28. This witness noticed that the accused had been issued 100 numbers of bullets, out of which 99 were of the same manufacturing details, while one was not having any year of manufacturing and it was very old. M.O.9 series are the 99 bullets and M.O.10 is the single bullet. M.O.1 is the rifle of the accused, which was seized.

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P.W.28 examined the rifle seized from the accused on 6.2.1995 and he found oil deposit in the barrel as well as in the bolt head. He issued Ex.P.20 certificate and M.O.1 is the rifle examined by him. P.W.29 was working as Subedhar in Central Training College, Nandal, Maharashtra. On 6.2.1995, P.W.27 directed him to arrest the accused and he accordingly apprehend the accused with his arms and ammunitions and his Government stores. M.O.1 is the rifle. He also seized 100 bullets from the accused, but out of 100, 99 bullets belong to one lot and they are M.O.9 series. M.O.10 is the other bullet, which did not contain any markings. Ex.P.19 is the Inspection report signed by him. He asked P.W.29 to examine the rifle. Ex.P.21 is the medical report on the examination of the accused at that time. Since the doctor, who issued Ex.P.21 had left the service, he could not be examined. P.W.31 is examined to prove the examination of the accused in the investigation police station on his production from Maharashtra. But however, except admitting his signature in the recovery mahazar and the confession statement (Exs.P.30 and 31 are the signatures), he did not support the prosecution case. Therefore, he is treated as hostile. P.W.32, examined for the same purpose, supported the prosecution case and Ex.P.33 is the recovery mahazar in which M.O.11 came to be recovered. P.W.36 had deposed that the accused had not surrendered the weapons issued to him earlier. P.W.37 was the Principal of Recruitment Training College No.II, Avadi during the relevant time. The deceased, P.Ws.6, 10 and 15 were working under him at that time as Assistant Principals. The accused was also working under him. He received communication that the accused had failed in one subject and he was disqualified on he being caught red handed while copying. The deceased told him that he caught the deceased red handed, while he was copying. The deceased informed this witness that the accused had failed in three subjects and why he was permitted to appear in one examination. P.W.39 continued his investigation by examining other witnesses and recorded their statements. After completing all the legal formalities, he filed a final report in the Court.

9. When the accused was questioned under Section 313 of the Code of Criminal Procedure on the basis of the incriminating materials made available against him, he denied each and every circumstance put up against him as false and contrary to facts. He had filed a written statement under Section 233(2) of the Code of Criminal Procedure admitting that he had enmity or grudge against the deceased and therefore, out of suspicion, he had been falsely implicated in this case. As noted earlier, neither any documentary nor any oral evidence was brought before Court at his instance. Exs.C1 and C2 came to be marked as Court exhibits.

10. Mr.S.Shanmugavelayutham, learned counsel appearing for the appellant would contend that the entire case of the prosecution rests only on the oral evidence of P.W.1, who is examined as the only eye

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witness in this case. His evidence, it is submitted by the learned counsel for the appellant, is far from convincing and therefore, this Court can easily disbelieve his evidence and thus acquit the accused. His evidence in Court is at variance with the contents of Ex.P.1 and on that score also, his evidence has to be rejected. P.W.1 is continuously trying to improve the prosecution case only in Court and in Ex.P.1, there is no mention about the deceased, while alive, giving any oral dying declaration. Therefore, the oral dying declaration, relied upon by the prosecution cannot be believed. Therefore, the argument is that there is no legal evidence to connect the accused with the crime.

11. We have heard the learned Additional Public Prosecutor on the merits of the case.

12. In the light of the submissions made by the learned counsel on either side, we went through the entire records. Abhey Singh is the higher officer in the hierarchy of CRPF at Avadi. The accused was working under him. The accused had killed his superior by firing the gun at him - may be from point blank range or standing in close proximity. The occurrence was in the early hours of 5.2.1995. Why he had killed his superior in the manner spoken to by the prosecution is the question to be answered by them. They project that the accused had a motive against his superior, namely, Abhey Singh. The motive aspect is spoken to by P.Ws.1,4,20,23,24,25 and 37. The accused was always at the receiving end, namely, he was often reprimanded by the deceased and at his instance by the superiors. In the service register of the accused also, adverse entries were being made at the instance of the deceased is the sum and substance of the evidence of those witnesses. P.W.14 is the Principal of the Recruitment Training College No.II, Avadi. The deceased was working under him as Assistant Commandant and the accused was working as a Naik at that time. His evidence shows that the deceased had sent a report to him about the conduct of the accused in discharge of his duties, which made him enquire both, resulting in giving a warning to the accused. He was advised to respect the seniors. His evidence also shows that the deceased had served a warning memo Ex.P.7 to the accused and it contains his acknowledgement. Ex.P.8 is another detailed report sent by the deceased to this witness complaining about the misdemeanour and misconduct of the accused in the discharge of his duties. Then we have the evidence of P.W.20, who is none else than the Commandant of C.T.I. at Avadi. His evidence shows that the deceased once caught the accused red handed while he was copying and Exs.P.12 and P.13 are the respective records in regard thereto and on top of Ex.P.12 the answer sheet, the deceased had written that the accused was found copying. Ex.P.14 is the result sheet for that examination and in serial number 90 against the name of the accused, it is found written that he was disqualified. P.W.23 is another official witness, who also speaks about the deceased catching the

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accused red handed while he was copying, which he had proved through Exs.P.2 and P.15, and handed over the same to the police during investigation. P.W.24 is another official witness, who speaks about serving a warning memo Ex.P.7 on the accused under his acknowledgement. P.W.25 another official witness, who would say that on an earlier occasion, namely on 8.1.1994 when the accused did not report for duty, the deceased had given him a warning memo. P.W.37 is the last of the witness in the series, who is also an official witness. He also speaks about the deceased catching the accused red handed while he was found copying in the examination. Therefore it is clear to our mind that the accused might have been seriously apprehending that the deceased was coming in his way of success and therefore, he would have definitely developed hatred towards the deceased. In the fact of evidence referred to above we hold that the prosecution case that the accused had a strong motive against the deceased stands fully established.

13. Let us now come to the occurrence proper itself. P.Ws. 1 and 5 are the sons of the deceased. P.W.4 is the wife of the deceased. Admittedly, the occurrence was seen only by P.W.1. We have already narrated in extenso the evidence of P.W.1. His evidence shows that as he was following his father by going through the aisle to find out who is pressing the calling bell, he noticed the accused with a gun and then firing at his father. It is not as though P.W.1 is a stranger to the accused. In fact, in his evidence in Chief itself, he has stated that the accused had visited the house twice earlier when he was present there and in fact once during lunch hour when his father/deceased was in the house, the accused came to meet him. P.W.1 was doing +2 on the occurrence day. Though he had been cross examined at length to test his capacity to identity the assailant, yet we find nothing in his cross examination to doubt his capacity to identify the assailant. He had seen the assailant in a close proximity. There is evidence to show that the street lights were burning at that time. P.W.1 is the author of Ex.P.1. Even in Ex.P.1, he had come to give the name of the accused as the assailant and names of all the witnesses. Having regard to the CRPF campus at Avadi and finding no material at all to even doubt that there is a possibility to implicate falsely, especially when nothing is projected against any of the witnesses to show that they have a reason to speak against the accused, we are inclined to hold from the evidence of P.W.1 that it is the assailant, namely, the accused and the accused alone, who fired at his father. In addition to the direct evidence of P.W.1, we have the evidence of a few witnesses to whom the deceased, while alive, had given an oral dying declaration. The first oral dying declaration is to P.W.1 himself, who would say that on the way to the hospital, his father had implicated the accused as the person responsible for the gun shot injury on his body. It is true that in Ex.P.1 the complaint, P.W.1 had not stated so. Omission to state that detail in Ex.P.1, in our considered

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opinion would not vitiate the evidence of P.W.1 itself on that aspect. P.W.4 is the wife of the deceased. To her also, her husband had told that he had suffered the gun shot injury at the hands of the accused. It is no doubt true that she had not seen the occurrence itself, but however, as already stated, her husband has given the oral dying declaration to her. In cross examination, this witness reiterated that such a oral dying declaration was given by her husband to her. P.W.5 is the other son of the deceased and he had also stated that when he came out, his father said that the accused had shot at him. He also stated that when he and his mother peeped through the window, he saw the accused with the rifle running, chased by P.W.1. As already noted, neither P.W.4 nor P.W.5 had actually seen the accused firing at Abhey Singh - since deceased. As rightly contended by Mr.S.Shanmugavelayutham, learned counsel for the appellant, there is no mention about the oral dying declaration of the deceased anywhere in Ex.P.1. But from that mere failure alone, we are not inclined to persuade ourselves to disbelieve the evidence of P.Ws. 1,4 and 5 that the deceased gave a oral dying declaration implicating the accused as the person responsible for the crime. In the light of our discussion, as referred to above, we conclude that the evidence of P.Ws.1,4 and 5 disclosing the dying declaring made by the deceased to them definitely establishes the guilt of the accused beyond all reasonable doubt. Their evidence are so natural and convincing. We see no reason at all as to why we must disbelieve their evidence.

14. It is no doubt true in Ex.P.29, it is seen that one fired 7.62 mm calibre cartridge case was not fired from the rifle examined by the ballistic expert. That rifle is marked as M.O.1 in this case. Ex.P.29 shows the following details:

> "The following articles were received here in 24.2.95 through police constable No.2675 Thiru H.Jameel Basha, under unbroken seals which corresponded with the sample sent, viz:-
>
> One long gunny parcel containing,
> Item 1, One 7.62 mm, calibre bolt action rifle bearing No.F6044 and butt No.646.
> One gunny parcel containing,
> One ammunition carrying bag containing,
> Item 2, Fifty 7.62 mm calibre 'OFV-93'
> Cartridges in ton chargers.
>
> One ammunition carrying bag containing
> Item 3, Forty Nine 7.62 mm calibre 'OFV -93'
> cartridges in ten chargers.

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Item 4, One 7.62 mm calire cartridge.
One paper packet containing,
Item 5, One fired 7.62 mm calibre OFV – 93 cartridge case.

We examined the above articles and we are of opinion that:

i) item 1 is a 7.62 mm calibre bolt action rifle; the cartridges, items 2,3 and 4 and the cartridge case, item 5 are of 7.62 mm calibre;

ii) the cartridges, items 2 and 3 and the cartridge case item 5 made in the Indian Ordnance factory; the cartridge, item 4 is of unknown make;

iii) combustion product of any propellant was not detected in the barrel of the rifle, item 1;

iv) test firing was conducted and the rifle, item 1 was found to be in working condition; four cartridges from item 3 were used up for test firing; (45 cartridges and 4 fired cartridge cases will be returned under item 3);

v) the cartridge case, item 5 was not fired in the rifle item1; (on examination under comparison microscope, the characteristic features of the marking of firing pin and breech were found to be different on the cartridge case, item 5 and the test cartridge cases obtained from the rifle item 1);

vi) the effective range of the rifle item 1 is about 300 metres."

But the fact remains established that the deceased died due to gun shot wounds. P.W.35 is the doctor, who had conducted post mortem on the dead body. Ex.P.35 is the post mortem report. We have already extracted the symptoms found on the dead body from the post mortem report. The evidence of the doctor shows that injury number 1 is the wound of entry by a fire arm bullet; injury number 2 is the track of the bullet on the right lung; and injury number 3 is the wound of exit by the fire arm bullet. The evidence also shows that injury number 2 is sufficient to cause death in the ordinary course of nature and those injuries could have been caused by a weapon like M.O.1. Therefore, there cannot be any doubt at all that Abhey Singh died due to gun shot injuries. As rightly contended by the learned counsel for the appellant and conceded by the learned Additional Public Prosecutor, there is a doubt based on Ex.P.29, whether the

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rifle produced in this case could have been used to fire the cartridge?. There is medical evidence to show that Abhey Singh died due to bullet injuries. Having regard to the report Ex.P.29, we have applied our mind to find out whether there is any other legal evidence to show that there was firing at the scene of occurrence. M.Os.2 and 3 are the tin metal sheet and a wooden log recovered from the scene of occurrence. P.Ws. 9 and 12 speak about the recovery of M.Os. 2 and 3 from the scene of occurrence under Ex.P.6 recovery mahazar. Ex.P.4 is the observation mahazar, which shows that there is evidence of bullet piercing through M.Os.2 and 3. Ex.P.6 is the recovery mahazar itself, which also shows that in the above referred to two material objects, namely, M.O.s 2 and 3, there is evidence of entry of bullet. Ex.P.22 is the requisition given by the investigating officer to the Court requesting, among other things, whether on M.O.s 2 and 3 there are evidence regarding entry of bullet. Ex.P.28 is the report of the scientific expert, which we extract here under:

> "The following articles were received here on 9.2.95 through police constable No.CE 2675 Thiru Jameel Bash, under unbroken seals which corresponded with the sample sent, viz:-
>
> Item 1. One trunk of a tree with a bullet embedded
> Item 2. One metal sheet measuring 182.5 x 80.5 cm. There is an irregular hole on it.
>
> We examined the above articles and we are of opinion that:-
>
> i) the irregular hold on the metal sheet, item 2 is caused by the impact of a bullet; the bullet has entered on the side marked "A" and exited from the side marked "B".
>
> ii) one nose portion of a bullet, one tiny piece of the jacket of a bullet and five tiny lead pieces were extracted from the trunk of the tree item 1; all these are portions of a disintegrated bullet; the nose portion of the bullet is the jacket of a disintegrated 7.62 mm calibre bullet; it was fired from a 7.62 mm calibre rifle; it is void of any characteristic markings; hence it is not suitable for comparison and identification with any particular rifle."

Ex.P.28 shows that in M.O.2 bullet has entered on the side marked 'A' and exited from the side marked 'B' and in M.O.3 one nose portion of a bullet, one tiny piece of the jacket of a bullet and five tiny lead pieces were extracted from the trunk; all those are portions of a

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disintegrated bullet and the nose portion of the bullet is the jacket of a disintegrated 7.62mm calibre bullet. Therefore, there are intrinsic material available on record itself that from the scene of occurrence, evidence of firing by a gun are recovered and M.Os.2 and 3 contain enough materials, as referred to above, to show that bullet fired from the weapon entered in those two objects and from one of the objects, pieces of bullet have been recovered. Under these circumstances, we have no doubt at all to conclude that besides the evidence of P.W.1 that his father was shot by the accused by using a weapon, there are materials on record to show that in the scene of occurrence there was a firing incident.

15. In the context of the contents of Ex.P.29 that the fired cartridge could not have been fired from the rifle examined by the ballistic expert, can it be said that the entire prosecution case must fail? In Ex.P.1, the complaint, P.W.1 had only stated that he heard gun shots of bullet. Of course, he had stated in that complaint that he heard two or three gun shots. But in the oral evidence, P.W.1 had stated that there was only one shot. In our considered opinion, this evidence of P.W.1 as to how many shots were fired at his father - assuming it is at variance with the contents of Ex.P.1 that he heard two or three gun shots, cannot be considered to be so very vital to affect his evidence in toto. P.W.1 was a young boy. The occurrence was early in the morning and therefore when he lodged the complaint (Ex.P.1), he would not have been in a position to say how many gun shot sounds he heard. Probably, this variation as indicated above may assume importance if the presence of more than one assailant at the crime scene is established. But the consistent case of P.W.1 is that, there was only one assailant and that assailant is the accused before court. In his evidence also, P.W.1 had stated as hereunder:

> "I saw the accused with gun in his hand; he fired one round at my father."
>
> "The accused had a long gun in his hand and M.O.1 is the gun, which the accused was having at the time of shooting."
>
> "There was only one gun shot and I am sure of it."
>
> "I have not seen M.O.1 after the incident and only seeing this day."

He was examined in court some time in the year 1999. The occurrence was on 05.02.1995. On the day when he gave evidence in court, he was 21 years of age. Therefore from the mere admission in his evidence that "M.O.1 is the gun which the accused was having at the time of shooting", it cannot be held that based on the contents of Ex.P.29, the whole prosecution case must fall to the ground.

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16. Mr.S.Shanmugavelayutham, learned counsel for the appellant, would vehemently contend that if the report of the ballistic expert do not show that the fired cartridge could not have been fired from the weapon produced in Court, the whole prosecution case must fall to the ground. For this purpose, he relies upon two judgments of the Supreme Court one is AIR 1953 Supreme Court page 415 (Mohinder Singh V. The State) and the other is reported in AIR 1975 Supreme Court 1727 (Ram Narain V. State of Punjab). In the first case, the Supreme Court held that where the prosecution case comes out with the positive case, then they must prove the entirety of the case and if they fail, the prosecution case must also fall to the ground. The Supreme Court in that case has held as here under:

> "......
>
> 10. On a careful reading of the judgment under appeal, it appears that the learned Judges of the High Court strongly felt that they had no adequate explanation in the oral evidence before them for certain puzzling features of the injuries on Dalip Singh. This is exactly what we also feel in this case, and it seems to us that the evidence which has been adduced falls short of proof in regard to a very material part of the prosecution case. In a case where death is due to injuries or wounds caused by a lethal weapon, it has always been considered to be the duty of the prosecution to prove by expert evidence that it was likely or atleast possible for the injuries to have been caused with the weapon with which and in the manner in which they are alleged to have been caused. It is elementary that where the prosecution has a definite or positive case, it must prove the whole of that case. In the present case, it is doubtful whether the injuries which are attributed to the appellant were caused by a gun or by a rifle. Indeed, it seems more likely that they were caused by a rifle than by a gun, and yet the case for the prosecution is that the appellant was armed with a gun and in his examination, it was definitely put to him that he was armed with the gun P-16. It is only by the evidence of a duly qualified expert that it could have been ascertained whether the injuries attributed to the appellant were caused by a gun or by a rifle and such evidence alone could settle the controversy as to whether they could possibly have been caused by a fire-arm being used at such a close range as is suggested in the evidence."

The facts in the above case show that the victim – who died later on, was shown to have been fired by two assailants; one of the assailant was having a gun and the other assailant was having a rifle; the gun

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was exhibited as Ex.P.16; two empty cartridges and a blood stained cap of a cartridge were recovered from the place where the dead body was lying; the gun was produced by one of the assailants, the appellant before the Supreme Court was shown to be armed with a gun; the incriminating objects recovered from the place where the dead body was lying were examined by a forensic expert and that his opinion was that they could not conclusively say whether the incriminating objects recovered from the place, where the dead body was lying, were actually fired through the gun (Ex.P.16) or a similar gun or guns. The nature of injuries available in that case were also taken into account. In the context of the factual scenario, namely, two assailants having two different weapons, one having a rifle and the other (appellant in that appeal) having a gun; the injuries found on the dead body and entertaining a doubt as to whether the gun would have been used at all by the appellant in that appeal, the Supreme Court had held as extracted above. In the light of the above peculiar facts and in the light of the facts available in the case on hand where there is no dispute whether one assailant or more than one assailant was involved, we are of the respectful opinion that the judgment of the Supreme Court referred to above would not apply to the case before us.

17. In the last case referred to above, it appears that the prosecution case was inconsistent with the medical evidence as well as with the evidence of ballistic expert only on one ground (i.e.,) whether the injuries were due to firing once or twice. There was no dispute regarding the nature of weapon used. Learned Additional Public Prosecutor brought to our notice the judgment of the Supreme Court to sustain that the contents of Ex.P.29 showing that a weapon like M.O.1 could not have been used to fire in this case, could not vitiate the prosecution case in its entirety. Learned Additional Public Prosecutor relied upon the judgment reported in 1994 SC 1029, where the Supreme Court has held as here under:-

> "..... 7. P.Ws.4,5 and 6 have been cross-examined at length. Except eliciting some omissions in respect of minor details they have not been shaken. So far as the medical evidence and the expert evidence in respect of nature of the weapons used and the distance from which the shots were fired, are concerned, we do not come across any serious infirmity in the prosecution case. The Doctor, P.W.1 who conducted the post-mortem, has stated that the injuries found on the deceased must have been caused by fire-arms. As a matter of fact some pellets also were removed from the body. Therefore there cannot be any doubt that the fire-arms were used. He was cross-examined but he asserted that the distance from where the pellets were recovered from the entrance wound

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on the head may be more than 6" and that injuries Nos.1 and 2 were caused from a very close range. In view of this positive evidence even if some of the recovered weapons as per the ballistic expert's evidence could not have been used, that by itself is not a serious infirmity. The eye-witnesses have categorically stated that country-made pistols were used and the medical evidence shows that the death was due to injuries caused by fire-arms. This aspect has been considered by the Sessions Court in detail and it has been rightly observed that the shots have been fired from country-made pistols. There was every possibility of the holes caused being slightly bigger than muzzle. We have carefully gone through the evidence of the eye-witnesses and reasons given by the two courts for believing their evidence. We see absolutely no grounds to come to a different conclusion. Accordingly, the appeals are dismissed."

18. In the light of the above judgments, let us apply our mind as to whether on the basis of Ex.P.29, the prosecution case can be totally disbelieved. For deciding this point, we will have to find out whether there is any description of the weapon said to have been used by the accused in firing at the victim. In Ex.P.1, P.W.1 had stated that only he heard gun shots. In Ex.P.35 post mortem report, the doctor opined that death is due to gun shot injuries. In his evidence also, the doctor had stated that it is a fire arm bullet. What is recovered and produced in Court by the investigating agency is a service rifle marked as M.O.1 in this case. We have already referred in the earlier portion of the judgment the evidence of stores in-charge, who had deposed based on records, that besides giving a service rifle, the accused was also given 100 rounds of cartridges, when he was deputed for election duty to Patna. The accused was arrested on 6.2.1995 in Nandal in Maharashtra. It is no doubt true he was found in possession of 100 rounds of cartridges, but a close scrutiny reveals that out of 100 rounds, the accused had 99 cartridges which has the necessary details of having been issued by CRPF and one does not belong to the description found in the other 99 cartridges. There is evidence to show, as we have already referred to earlier, that whenever ammunitions are issued to a CRPF personnel, it would be issued from the same lot and there is no scope for issue from different lots to one individual. Therefore, it is clear that out of 100 rounds of cartridges issued from an authenticated stores, the accused has accounted only for 99 such cartridges and he has not accounted for the remaining one. But however, he is found to have made good the shortage by being in possession of a different cartridge, for which possession, he had no explanation at all. As noted earlier, P.W.1 was doing only +2 at the time of examination and he may not know the difference between a gun and a rifle. But he had stated gun shot and probably in common

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parlance, he had called it as a gun. But the medical evidence shows that it is a gun shot wound. Ballistic expert report shows that rifle M.O.1 could not have been used to fire the fired cartridge. Not only there is oral evidence of P.W.1 that his father was fired at by the accused, but also there are intrinsic, inherent materials available in the spot itself about which we have already referred to earlier, which shows that at the scene of occurrence there was firing by a weapon. The accused is not a total stranger to weapons. In view of the overwhelming materials available in the evidence of P.W.1 and the materials recovered at the spot, we have no doubt at all that the accused had used a fire arm in firing at the victim, resulting in his death. The medical evidence is in total corroboration to the oral evidence of P.W.1 that his father died due to gun shot injuries.

For all the reasons stated above, we find no merits in the appeal and accordingly it is dismissed sustaining the judgment under challenge.

sl

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

1. The Principal District and Sessions Judge, Chengalpattu
   (with records)
2. The Director General of Police, Chennai.
3. The District Collector, Chengalpattu.
4. The Public Prosecutor, High Court, Madras.
5. The Inspector of Police, Avadi Tank Factory Police Station, Chengai East District.
6. The Superintendent, Central Prison, Vellore.
7. The Section Officer, Crl. Section, High Court, Madras.

+ one cc to Mr.S.Shanmugavelayutham, Advocate Sr.no.24646.

MKJ (CO)
RSM/4.7.2006

Crl.A.No.1498/2003

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